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No. 89-68

In the Supreme Court of the United States

OCTOBER TERM, 1989

WILBURN GONCE, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in arbitrating certain disputes under a collective bargaining agreement between a union and the Veterans Administration, the arbitrators were required to give issue-preclusive effect to prior arbitration awards.

2. Whether the arbitrators erred in holding that grievances were not arbitrable because the union, in waiting over 17 months to request a list of arbitrators, unreasonably delayed resolution of the grievances in violation of the governing collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20)[1] is reported at 872 F.2d 995. The opinions of the arbitrators (Pet. App. 21-37 (Gonce case); Pet. App. 38-45 (Riley case)) are unreported.

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[1] Judge Nichols' dissenting opinion, which is omitted from petitioners' appendix, is reproduced as an appendix to this brief. App., *infra*, 1a-2a.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1989. The petition for a writ of certiorari was filed on July 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gonce and Riley were employed as members of the nursing staff of a locked psychiatric ward at the Veterans Administration Medical Center in Waco, Texas. Pet. App. 2. Between April and August 1986, the Veterans Administration (VA) issued letters of proposed removal to 19 employees, including Gonce and Riley, on charges that arose from alleged patient abuse documented by hidden videocameras. *Ibid.*

The VA terminated the employment of petitioner Gonce on June 12, 1986, and that of petitioner Riley on June 17, 1986. Pet. App. 5. Both employees, through their union, the American Federation of Government Employees, Local 1822 (the Union), challenged the termination through the grievance-arbitration procedure established pursuant to the collective bargaining agreement in effect between the VA and the Union. Pet. App. 2-3. On July 9, 1986, the union invoked arbitration on behalf of petitioner Riley; on July 25, 1986, it invoked arbitration on behalf of petitioner Gonce. However, the Union did not ask for a list of possible arbitrators, as required by the collective bargaining agreement,[2] until it did

[2] The collective bargaining agreement requires that: "On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator. The parties shall meet within ten (10)

so for both claimants on December 21, 1987, more than 17 months after it had invoked the arbitration procedures. Pet. App. 5.

The grievances were separately entertained by two arbitrators. The Union offered several mitigating reasons for the delay in requesting a list of arbitrators, including its representation of other affected employees before the Texas Employment Commission (Pet. App. 3, 23); a dispute over the quality of videotaped evidence that led the Union to file an unfair labor practice complaint with the Federal Labor Relations Authority (later dismissed as untimely filed) (Pet. App. 3, 23-24); and settlement negotiations held between the Union and the VA in the summer of 1987 (Pet. App. 3, 23). The arbitrators issued independent opinions rejecting the Union's excuses, and determining that the grievances were not arbitrable because the Union's failure to pursue them in timely fashion violated the collective bargaining agreement. Pet. App. 36 (Gonce), 44 (Riley). In reaching this conclusion, both arbitrators declined to follow prior arbitral decisions under the same agreement.

2. On petitioners' appeal of the arbitrators' decisions, the Federal Circuit affirmed. The court ruled that under this Court's decisions, "the preclusive effect or [*sic*] prior arbitration awards is for individual resolution, absent a provision in the governing contract" providing that earlier awards would bind subsequent arbitrators. Pet. App. 8. The court found that there was no such requirement in the collective bargaining agreement at issue in these cases. Pet. App. 8-9. In accordance with *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the United Rubber*

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calendar days after receipt of such list to select an arbitrator * * *." Pet. App. 96.

Workers, 461 U.S. 757, 764 (1983), the court limited its review to the question whether the arbitrators' conclusions were inconsonant with public policy or whether they instead "dr[ew] [their] essence" from the collective bargaining agreement. Pet. App. 12-13. The court noted that the collective bargaining agreement in fact allowed either party to request that multiple grievances over the same issue be handled individually (Pet. App. 13-14), and concluded that by this procedure the agreements contemplated a lack of uniformity among awards and accepted it as unobjectionable. *Ibid.*

The court found issue preclusion inappropriate in any event because although the *Gonce* and *Riley* cases were related to previous cases, the actions taken against the VA employees were based on separate instances of alleged misconduct. Pet. App. 10. The court noted that the absence of transcripts of previous arbitration proceedings left it unable to determine whether different mitigating circumstances might distinguish the cases. Pet. App. 10-11. Consequently, the cases were not marked by the "precise correspondence of facts, circumstances, and timing" that might make issue preclusion appropriate. Pet. App. 15. Finally, the court determined that the arbitrators' decisions were thorough and well reasoned on the merits. Pet. App. 15-18. Thus the court concluded: "We agree with the arbitrators that there comes a time when the employer has a right to know whether a union or employee intends seriously to prosecute a formal grievance, and there is no basis to overturn the conclusion that a seventeen-month delay is a violation of the collective bargaining agreement." Pet. App. 19.

Judge Nichols, dissenting, agreed with the majority that the arbitrators were not bound by any preclusive effect of the previous arbitral decisions, but concluded that the arbitrators had erred in ruling that the collective bargaining agreement imposed on the Union a requirement of a timely request for a list of arbitrators. App., *infra*, 1a-2a.

ARGUMENT

1. Petitioners principally contend (see Pet. 13-14, 18-19, 26-32) that the arbitrators below were bound by prior arbitral decisions allowing other grievants to secure arbitration of the merits of their grievances despite lengthy delays in requesting lists of arbitrators. However, the court of appeals was correct in holding that, in the absence of a statutory or contractual requirement, the preclusive effect of prior arbitral awards is a matter to be determined in each individual arbitration. And, as the court concluded after review, the arbitrators in these cases were not required to give the previous awards preclusive effect.

a. As an initial matter, nothing in the governing statute requires that a decision in one arbitration control disposition of the same issue in all subsequent arbitrations. The Federal Service Labor-Management Relations statute, 5 U.S.C. 7101 *et seq.*, requires only that collective bargaining agreements between covered agencies and employee unions "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). The statute is silent with respect to the preclusive effect of arbitral decisions and instead leaves that matter to negotiation.

b. Absent a contrary statutory directive, no principle of law requires arbitral decisions to be given preclusive effect in subsequent arbitral proceedings. To the contrary, in such circumstances the preclusive effect of a prior arbitral award depends solely on the terms of the collective bargaining agreement and hence is a matter of contract interpretation to be resolved through arbitration. Thus, in *W.R. Grace & Co.*, 461 U.S. at 764-765 & n.7, the Court held that the question whether one arbitrator must give preclusive effect to the decision of another arbitrator raises an issue of contract interpretation that is itself delegated to the arbitrator for decision. This holding was consistent with prior decisions of the courts of appeals, which, like the decision below, uniformly held that the preclusive effect of an arbitral award is determined with reference to the contract, not general principles of issue preclusion. See, *e.g.*, *Courier-Citizen Co.* v. *Boston Electrotypers Union No. 11*, 702 F.2d 273, 280 (1st Cir. 1983); *Little Six Corp.* v. *United Mine Workers Union, Local No. 8332*, 701 F.2d 26, 29 (4th Cir. 1983); *New Orleans Steamship Ass'n* v. *General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980), aff'd *sub nom. Jacksonville Bulk Terminals, Inc.* v. *Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Riverboat Casino, Inc.* v. *Local Joint Executive Bd.*, 578 F.2d 250, 251 (9th Cir. 1978).[3]

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[3] *Connecticut Light & Power Co.* v. *Local 420, Int'l Brotherhood of Electrical Workers*, 718 F.2d 14 (2d Cir. 1983), cited by petitioners (Pet. 14), is not to the contrary. The court in that case was faced with conflicting arbitral decisions, the first of which had been vacated by the district court. The court recognized that although arbitrators usually follow prior decisions, the principles of stare decisis and res judi-

c. The arbitrators' determination that they were not bound by prior arbitral decisions is a reasonable interpretation of the collective bargaining agreement and was properly upheld by the court of appeals. This Court has emphasized the limited scope of judicial review of arbitral decisions:

> When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," * * * a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.

W.R. Grace & Co., 461 U.S. at 764 (quoting *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (brackets in original)).

The arbitral decisions here plainly satisfy this deferential standard of review. The collective bargaining agreement states: "Multiple grievances over the same issue may be initiated as either a group grievance or as single grievances at any time during the time limits of Step 1 [of the grievance procedures]." Pet. C.A. App. 26 (Agreement, Art. 13, Sec. 10). As the court of appeals observed (Pet.

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cata do not apply with the same force in arbitration proceedings as they do in judicial proceedings. 718 F.2d at 20. Under the unusual circumstances of the case, in which the second arbitral decision was inconsistent with the first arbitrator's order to the employer to cease and desist, the court went on to uphold the district court's judgment on the ground that the second arbitral decision was the "better reasoned" of the two. 718 F.2d at 21.

App. 13-14), this provision indicates that a lack of uniformity among awards is not unexpected or objectionable.[4]

2. The court of appeals correctly affirmed the arbitrators' determinations that a 17-month delay in requesting a panel of arbitrators is unreasonable and violates the contractual provisions requiring the parties to resolve grievances promptly. As noted above, a reviewing court will not overturn an arbitral determination if the decision draws its essence from the contract and is not otherwise contrary to law or public policy. *W.R. Grace Co.*, 461 U.S. at 764-766. As the court of appeals indicated (Pet. App. 19), the arbitrators' decisions are consistent with contract provisions requiring "prompt and equitable settlement of grievances" (Pet. App. 94) and imposing on the union, as moving party, a duty to request a list of possible arbitrators "[o]n or after the date of the

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[4] Even if arbitrators were obligated to apply principles of issue preclusion, the court of appeals correctly determined that preclusion was not required on the particular facts of this case. This Court has held that a determination made in a prior proceeding is not preclusive in subsequent proceedings unless the litigant against whom preclusion is invoked has had a full and fair opportunity to litigate the issue and unless the issues are in substance the same. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979). Here, the court of appeals found that petitioners had failed to establish that the issues presented in their proceedings were identical to those resolved in the prior arbitral awards. Pet. App. 10-12, 15. Specifically, the court noted that the actions taken against the relevant employees were based on separate instances of misconduct. Pet. App. 10. It also noted that petitioners had failed to carry their burden of establishing that their cases involved the same mitigating circumstances as those that led the arbitrator in a prior case to permit a delay in requesting a list of arbitrators. Pet. App. 11.

notice to invoke arbitration" (Pet. App. 96). In addition, the court correctly reasoned that the arbitral decisions are consistent with federal policy favoring arbitration as a means of securing the expeditious resolution of grievances (Pet. App. 18).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

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[5] Petitioners also argue (Pet. 22) that the VA could not even raise the issue of the Union's tardiness because the VA itself did not make its "non-arbitrab[ility]" claim in a timely fashion. As the arbitrator in the Gonce case explained (Pet. App. 31), that contention is untenable, since the VA's delay in raising the issue to an arbitrator was *caused* by the Union's delay in requesting the list of arbitrators.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 88-3328, 88-3329

WILBURN GONCE AND LARRY RILEY, PETITIONERS

v.

VETERANS ADMINISTRATION, RESPONDENT

Apr. 13, 1989

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NICHOLS, Senior Circuit Judge, dissenting.

Respectfully, I dissent. I agree with the court about collateral estoppel, *i.e.*, if the parties had wanted decisions respecting different employees to be consistent, they could have taken steps to cause that to occur. It may be that antecedently they preferred to allow a possibility of inconsistency. They must have known the standard procedure produced a different arbitrator for each discharged employee, despite the close interrelationship of all the cases of the 19 removed employees—a strange way to run a railroad—but so it is.

I think the arbitrators in the Gonce and Riley cases made an over-imaginative use of the collective bargaining agreement. It does not expressly say, nor do I think it reasonably implies, that the union must request the panel of arbitrators without awaiting the outcome of settlement negotiations, or pursuit of other remedies, and within some fixed time. The likely result of a request would have been that the persons to arbitrate Gonce and Riley would have known of their selection, and they might have set their time clock running and gone to work on the cases, though settlement still seemed likely. The union made an uncontradicted showing that it would be unfeasible to try 19 cases or any substantial portion thereof simultaneously.

The union simply led Gonce and Riley into a trap for the unwary, set for them by parties more skilled than the union was in the intricate choreography of collective bargaining. The case once again shows how foolish any lay person is in these United States and this year of grace, 1989, to engage in any transaction, important and novel to him or her, without having a skilled (and expensive) lawyer at his elbow. As to the remedies Gonce and Riley may have against the union for loss caused by its obvious carelessness, *cf. Karahalios v. NFFE*, —— U.S. ——, 109 S.Ct. 1282, 108 L.Ed.2d 539 (1989).

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